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## Chapter 7

### Cicero's Reception in the Juristic Tradition of the Early Empire

Matthijs Wibier

#### 1. INTRODUCTION

Anyone interested in Cicero as a legal thinker and his importance in the development of Roman law will find herself facing a somewhat paradoxical situation. On the one hand, Cicero is often counted among the greatest ancient thinkers on law, while on the other his name and writings are largely absent from ancient Roman legal scholarship. A quick glance reveals that the Institutes of Gaius, a text from the second century AD, do not cite Cicero by name. Likewise, the fifty books of Justinian's Digest, our most important source for juristic writings, mention Cicero only a handful of times.<sup>1</sup> Even when it comes to the reception of ideas, Cicero's presence seems limited; it is at least sufficiently elusive as to create ample scholarly disagreement.<sup>2</sup> Yet Cicero undeniably had an extensive interest in legal matters, ranging from the wording of wills to questions about natural justice, and there is every indication that much of his oeuvre has circulated widely since his lifetime. For these reasons, it is worth considering how Cicero and his works were received by the jurists and how we should understand his relatively marginal presence in Roman legal thought.

The relation between Cicero and the Roman jurists has undergone thorough scholarly scrutiny, albeit mostly from a Ciceronian perspective.<sup>3</sup> Designated by Latin words such as *iure consultus* or *iuris peritus* or simply *prudens*,<sup>4</sup> a jurist functioned as a legal advisor to individuals with questions about the 'proper' interpretation of the law, which could involve written as well as unwritten law.<sup>5</sup> A jurist's answer, specific to the case at hand and known as a *responsum*, could be cited in court in support of one's case. The

authority of *responsa* was a function of the authority of their authors, who needed to be experts on customary practices in order to find a solution that could be considered 'right' – that is, a solution in line with traditional interpretations of statutes, or customary law, or, in lack thereof, Roman traditions. We should note at the outset that Cicero is generally not considered a jurist, either by the ancients or by modern scholars. The main reason is that Cicero, when pleading a case in the courtroom, is out primarily to win the suit for his client and as such acts as an advocate, not a jurist.<sup>6</sup> This image is strengthened by Cicero's own writings: he regularly portrays jurists as a group to which he himself does not belong.<sup>7</sup> As recent studies have pointed out, however, it is crucial to keep in mind that Cicero is often trying to construct an authoritative *persona* at the expense of the jurists.<sup>8</sup> The late Republic was a world that lacked a single ultimate legal authority and as such ownership of the law was diffused.<sup>9</sup> The result was that many individuals staked claims to legal expertise. Since it was his business to persuade others of his views, it served Cicero the Advocate to marginalise rival lawyers by relegating them to the ranks of the jurists, who he tends to construct as a class of inferior and somewhat pedantic students of the law. Hammering home the idea that he himself outclassed the jurists proved to be one of Cicero's favourite rhetorical ploys in a context in which the boundaries between different types of lawyers (including jurists and forensic orators) were not as clear as Cicero claimed them to be.<sup>10</sup>

In this chapter, I explore Cicero's relation to the jurists from the opposite perspective by studying how jurists viewed and read Cicero. Since only very little juristic material survives that dates to Cicero's lifetime, I will be focusing chiefly on jurists from the early Empire. On the one hand, this allows us to get as close as possible to the views of Cicero's contemporaries. On the other hand, and more importantly so, we should realise that intellectual legacies take shape over several generations and may display a multiplicity of appraisals. This is certainly the picture we get from several recent studies on Cicero's early reception outside the juristic sphere. Thus we should note that Cicero's actions as a politician received a mixed press. While executing some of Catiline's fellow conspirators provoked intensely hostile reactions for centuries after his death, Cicero's verbal attacks on Antony earned him superlative and universal praise. Yet in contrast to his equivocal reception as

<sup>1</sup> For a discussion of some of the complications involved in using the Digest as a source, see the next section.

<sup>2</sup> See for example Nörr 1978; Atkins 2013; MacCormack 2014, for widely different analyses and appraisals.

<sup>3</sup> Seminal studies are Frier 1985 and Harries 2006.

<sup>4</sup> Although generally accompanied by *iuris* or *iure*, all three adjectives do occur alone to refer to jurists (see OLD s.vv).

<sup>5</sup> *Interpretatio* is in fact used by jurists as a technical term to describe their activities. See Pomp. D. 1.2.2.6 (cf. Cic. Off. 2.65).

<sup>6</sup> See Crook 1995 for an excellent discussion of legal advocacy in the Roman world.

<sup>7</sup> For example at *Brut.* 150–7; *Mur.* 19–30.

<sup>8</sup> Harries 2006.

<sup>9</sup> See Harries 2002.

<sup>10</sup> Even though by the second century AD jurisprudence had grown into a more specialist discipline, gentlemen scholars such as Gellius were reading legal works and discussing legal problems. This suggests that law was far from being isolated from mainstream culture, as was held by scholars of previous generations. For an excellent discussion of Gellius and the jurists, see Howley 2013.

a politician, Cicero's reputation as a speaker and stylist was never seriously criticised; his eloquence (in writing) formed the gold standard for every orator who came after him.<sup>11</sup> These observations indicate that the reception of the author-as-person may be different from the reception of his writings. This distinction will prove relevant for the jurists as well, since some of their most polemical passages involve the name of Cicero rather than an engagement with his contributions to law. It should be clear that my reception-based approach has a major advantage over the traditional *Quellenforschung* approach. Where an earlier survey tried to establish the mechanics of quotation and misquotation,<sup>12</sup> this chapter takes as a starting point that quotation, and especially paraphrase and adaptation, presuppose a selection process on the part of the receiving author, which raises acute questions about underlying agendas. Similarly the reception perspective opens our eyes to how jurists construct the figure of Cicero in (sometimes, very) particular ways.

In mapping Cicero's legacy, I will proceed in three steps, which correspond roughly to his reception in juristic, rhetorical and philosophical terms. The next section discusses a number of quotations from Cicero's works in the Digest that are cited and used in the way jurists engage with the works of other jurists. This suggests that Cicero must occasionally have acted like a jurist, and that jurists mined his works to some extent for useful materials. The subsequent section studies juristic attitudes towards Cicero's place in legal history by focusing on the famous history of jurisprudence by Pomponius. Against the background of the polemical use of Cicero in the rhetorical tradition, we can see how Pomponius' narrative uses the figure of Cicero and rewrites some of his most hostile passages in order to push back on his attacks on the jurists. The final section addresses Cicero's importance as a legal philosopher. Arguing first that Cicero's philosophical reception in the juristic tradition cannot be proven, I show that the jurists avoid crediting the figure Cicero for any philosophical contributions at all. In his stead, they project and construct the jurist Labeo (Augustan Age) as the all-eclipsing legal philosopher of Rome – and it seems that polemical considerations once more play a role here.

## 2. THE JURISTIC TRADITION AND THE DEFINITIONS OF MARCUS TULLIUS

This section surveys the quotations that the Digest ascribes to Cicero. I argue that they are well at place in, and should hence be understood within,

<sup>11</sup> A recent survey is Gowing 2014; older surveys are Kennedy 2002 and Winterbottom 1982. See MacCormack 2014 for late antiquity, Bishop 2015 for Cicero's pairing with Demosthenes and Plato, Kaster 1998 on Cicero in the rhetorical schools (cf. La Bua 2006), and Dressler 2015 on the figure of Cicero.

<sup>12</sup> Nörr 1978 (a slightly expanded version of Nörr 1977).

a book culture that is characterised by jurists who excerpt other jurists and compile collections of legal opinions. Before turning to Cicero, then, I will first discuss briefly the juristic tradition and point out some of the peculiarities involved in working with excerpts.

The introduction above has mentioned that legal opinions were typically given in response to specific queries. From scattered remarks in Cicero's œuvre, it appears that for the middle and late Republic the standard scenario involved individuals approaching a fellow citizen with a certain authority in legal affairs.<sup>13</sup> But it is important to stress that questions could come up and might need addressing in many situations: while court cases obviously often revolved around legal technicalities, issues could also arise with officials in exercising their office as well as during discussions in an educational setting.<sup>14</sup> Legal opinions given in response to such problems were treated as interpretations of the law with a certain authority, although this varied somewhat depending on the status of the issuing jurist. Since they clarified problematic aspects of the law, *responsa* along with case descriptions (occasionally including case decisions) were preserved for future reference, which in addition to legal disputes included legal education. According to Cicero, in educating the next generation some prominent jurists allowed students merely to observe their giving of *responsa*, while others invited students to their houses for question-and-answer sessions that went over old cases and sometimes developed hypothetical problems as well. For the specific legal cases we hear about in the sources, it is often impossible to establish in what form their dossiers reached the jurist-teacher who discussed them with his students; but generally speaking it must have involved a mixture of the senior jurist's personal recollection, of documents preserved in the family archive, and increasingly also of material found in opinion collections in book form. Cicero's œuvre once more makes it clear that by his time opinion collections circulated that contained the views of more than one older generation of jurists. For example, we learn from one of Cicero's letters that the work *De iure civili* of Quintus Mucius Scaevola the Pontifex (consul 95 BC) listed the opinions of different jurists organised by topic.<sup>15</sup>

The same letter from Cicero indicates that Mucius' work made it easy to look up what others had said about a certain topic. From the excerpts of juristic works preserved by Justinian, we can see that as time evolves jurists increasingly cite and refer to other jurists. While commentaries and polemical works were being produced and survive in small fragments,

<sup>13</sup> The following short overview intends to present the standard narrative; for an overview with ample source references, see for example Wibier 2014: 361–3.

<sup>14</sup> See for example Gell. NA 13.13 (a *quaestio* concerning jurisdiction) and Alfenus Varus, D. 38.1.26.1 (for a question of a student to his teacher).

<sup>15</sup> Cic. Fam. 7.22 (= SB 331). The letter does not explicitly say that Mucius' work was consulted, but scholars generally assume so (e.g. Shackleton Bailey 2001).

much effort was devoted to producing selections from previous literature, so-called digests, in order to keep track of legal opinions and arguments that had been circulated, and to keep consultation of a variety of views manageable.<sup>16</sup> In effect, Mucius' work constitutes the earliest such digest of which we know. Alfenus Varus (cos. suf. 39 BC) was the first to use the title *Digesta* for his work, which was probably a collection of both his own opinions and those of his teacher Servius Sulpicius Rufus. The second-century AD jurist Pomponius tells us that a certain Aufidius Namusa, a student of the same Servius Sulpicius, 'digested' the works of his fellow students in a massive work spanning 140 books (*digesti sunt*, D. 1.2.2.44). Even introductory legal textbooks could take the form of digests: Gaius' *Institutes*, one of the few legal texts from the early Empire that survive independently from Justinian's project, is a handbook that credits points of legal doctrine to individual jurists. Standing at the end of a long tradition of legal digests, the fifty books of Justinian's Digest (brought into circulation in AD 533) present the opinions mainly of jurists dating to the first through third centuries AD, although the views of older jurists are regularly quoted directly or indirectly. For example, while Q. Mucius Scaevola himself features occasionally in the Digest, in practically all cases his opinions occur as quoted or paraphrased by other jurists.<sup>17</sup>

Once we realise that excerpting and paraphrasing are central technologies of the Digest and its forerunners, questions arise in terms of textual and source criticism: what does it mean for the text, and the ideas presented therein, that we are dealing with an excerpt or even a paraphrase? How accurate are the texts? How much have the excerpted texts been edited? These questions in combination with worries about poor syntax gave rise to a hunt for 'interpolations' in the Digest among earlier generations of scholars. While the problem is real, recent studies of passages in the Digest that are also attested via independent channels have shown that syntactical and stylistic considerations are often misleading and highly subjective, and that the interventions of excerptors appear to be primarily stylistic rather than substantive.<sup>18</sup> As such, most scholars now work on the hypothesis that the Digest gives a fair rendering of the words of the authors it is quoting, while remaining open to the possibility that new evidence might prove otherwise for the particular excerpt under scrutiny.

The following passage gives a flavour of juristic excerpt collections and brings us back to the issue of quotations from Cicero in the Digest:

<sup>16</sup> To be sure, I am using the term 'digest' here fairly widely to refer to a type of text that brings together and organises legal opinions on certain topics. My usage here is not limited to works entitled *Digesta*.

<sup>17</sup> See Lenel *Paling*, 2.757–62.

<sup>18</sup> See Nelson 1981 for a collation of quoted passages from Gaius' *Institutes* in the Digest against the MS of Gaius. See in general Honoré 2010.

CELSUS libro vicensimo quinto digestorum. litus est, quousque maximus fluctus a mari pervenit: idque Marcum Tullium aiunt, cum arbiter esset, primum constituisse. [1.] praedia dicimus aliquorum esse non utique communiter habentium ea, sed vel alio aliud habente. (D. 50.16.96 pr. – 1.)

CELSUS, in the twenty-fifth book of the *Digesta*: the 'shore' is as far as the highest tide reaches from the sea: and they say that Marcus Tullius first established this, when he was deciding a case. Of 'estates' we surely do not say that they belong to those holding them in common, but rather when everyone has their own.

The passage gives us two definitions, suggesting that it was excised from a longer list of legal definitions. Note further that this excerpt is a digest at several levels: being part of Justinian's Digest, it quotes Book 25 of a work rather aptly entitled *Digesta* by the jurist Celsus, who was active in the reigns of Trajan and Hadrian. Celsus himself excerpts and summarises further, mentioning unnamed others who quote or paraphrase Cicero. The term *aiunt* is conventional language among the jurists, which generally indicates that they found something in a written source.<sup>19</sup> Furthermore, the fact that Celsus mentions Cicero's capacity as an *arbiter* suggests that Cicero (supposedly) formulated this view during a legal proceeding when a question about the exact boundaries of the shore came up. Expressed in a practical situation in response to a specific query, the opinion was apparently appreciated, and it entered the juristic tradition for that reason. Celsus' *aiunt* indicates that by his time the definition was generally accepted and could be found in many legal works, which is confirmed by Quintilian's report that 'jurists' (*iuris consulti*), as a group it seems, define the shore as 'as far as the tide rolls' (*qua fluctus eludit*, 5.14.34–5).

While Celsus and Quintilian both point out that the definition circulated widely, the difference in wording between them opens up the source question. It has long been pointed out that both authors take up a passage from Cicero's *Topica*:<sup>20</sup>

solebat igitur Aquilius collega et familiaris meus cum de litoribus ageretur, quae omnia publica esse voluit, quaerentibus iis quos ad id pertinebat quid esse litus, ita definire: *qua fluctus eluderet*.

For, when there was a case about shores, which you [jurists] want to be all communal, my colleague and friend Aquilius used to give the following definition when those whom this concerned asked what a shore was: 'as far as the tide rolls'.

It should be clear from this passage that Quintilian stays closest to the Ciceronian text. Celsus, on the other hand, not only reformulates the

<sup>19</sup> For example in Pomponius, who introduces a paraphrase of Cicero's *Brutus* with the words *Cicero ait* (D. 1.2.2.40). See below.

<sup>20</sup> *Top.* 32. See Nörr 1978: 126.

definition, he also ascribes the definition to Cicero himself rather than to Aquilius Gallus. Regarding the reformulation, we should note that it cannot really be considered a corruption of Cicero: while the Ciceronian–Aquilian concept of ‘shore’ is preserved, the tweaking of the phrasing makes the expression even clearer, which should be no problem in a legal context. We may thus take Celsus to be paraphrasing a definition found in the Ciceronian *corpus*. Furthermore, the attribution to Cicero instead of Aquilius suggests that Celsus (or his source) quoted from memory, and then put the definition down in much the same words as before and tagged it with Cicero’s name.<sup>21</sup> Yet even if this seems a straightforward account of the divergence between Celsus and the text of the *Topica*, the present state of evidence does not allow us to rule out at least two further interpretations. On the one hand, it is not impossible that Cicero actually used Aquilius’ definition in a case in which he was an *arbiter*, and that the version found in the case dossier somehow entered the juristic tradition. On the other hand, we will see in more detail in the next section that the jurists of the early Empire operated in an intellectual setting that was rife with polemic against them. These attacks were themselves a self-conscious form of Ciceronian reception, projecting Cicero, and with him oratory, as superior to jurisprudence. Within this context, we may read Celsus’ elision of Cicero and Aquilius as a deliberate attempt to co-opt Cicero for the juristic tradition and to show that he at times wore a jurist’s hat, thus erasing to some extent the boundaries between types of lawyers as found in the Ciceronian *corpus*.<sup>22</sup> No matter which of these views we prefer, the key point to note is that Cicero is presented as an authority of legal definition and is treated as a fellow jurist by Celsus (and perhaps already his source), and later by Justinian’s compilers, without hesitation or justification. All this indicates that Cicero and his writings could be taken seriously as contributing to juristic debates in the first centuries after his death.

A similar argument about Cicero’s potential value to juristic discussions can be made on the basis of a definition of *latitare* ascribed to him by the third-century AD jurist Ulpian. The following quotation is a passage taken from Ulpian’s commentary on the praetor’s edict:

quid sit autem latitare, videamus. latitare est non, ut Cicero definit, turpis occultatio sui: potest enim quis latitare non turpi de causa, veluti qui tyranni crudelitatem timet aut vim hostium aut domesticas seditiones. [5.] sed is, qui fraudationis causa latitet, non tamen propter creditores, etsi haec latitatio creditores fraudet . . . (D. 42.4.7.4–5)

<sup>21</sup> Cf. also the reformulation of *cum . . . ageretur* as *cum arbiter esset*. This is along the lines of the explanation given by Nörr 1978: 126–31, although I do not think that Celsus’ reformulation necessarily means that the text of the *Topica* was only transmitted orally, which Nörr contends.

<sup>22</sup> See below. We will see that jurists generally try to exclude Cicero from their ranks, but there is no need to assume that all jurists had the same ideas about how to handle Cicero and Ciceronian polemics.

But let us see what constitutes ‘hiding’. ‘Hiding’ is not, as Cicero defines it, a shameful concealment of oneself: for someone can hide due to a cause that is not shameful, such as when someone fears the cruelty of a tyrant or the strength of the enemy or uprisings at home. However the person who hides in order to deceive, yet not because of his creditors, although this hiding deceives the creditors . . .

This discussion about the meaning of ‘hiding’ comes up in the context of a praetorian provision known as *missio in possessionem* (‘seizure of property’), which could be used, for example, against someone who was in debt. Ulpian informs us that the praetor will grant an action against a person hiding out of fraudulence (*praetor ait: qui fraudationis causa latitabit . . .* 42.4.7.1). After a few introductory points, the question about the technical legal meaning of *latitare* is raised. Several definitions are reviewed. The first of these, which is rejected, is explicitly attributed to Cicero. This definition was long considered a fragment from a lost work of Cicero until Jane Crawford demonstrated that it forms a paraphrase of *De domo sua* 83.<sup>23</sup> Furthermore, Crawford has suggested that Ulpian’s subsequent discussion of the technical juristic definition may evoke Cicero’s *Pro Quinctio*, which features the phrase *qui fraudationis causa* and a form of *latitare* at two points (60, 74). Even though both Ulpian’s text and the *Pro Quinctio* indicate that this clause occurred in the praetor’s edict and must as such have been fairly widespread,<sup>24</sup> the activation of the Ciceronian connection in the preceding sentence invites us to consider Cicero’s more technical discussion of *latitare* in the *Pro Quinctio*, which is in line with technical juristic conception of the term. On this reading of the passage quoted above, Ulpian’s text engages with the Ciceronian *corpus* in a complex way. First and foremost, it signals the value for a jurist of comparing and contrasting different speeches of Cicero, and the legal knowledge that can be harvested from this process if done in the right way. In addition, by showing off knowledge of Cicero’s works, the text casts Ulpian as a jurist exemplary for his learnedness and the acumen required for properly assessing the writings of others.<sup>25</sup>

The final explicit reference to Cicero’s writings in a discussion of legal doctrine can be found in a passage by the jurist Tryphoninus (active around/

<sup>23</sup> Crawford 1994: 311–12, ‘*turpis occultatio sui ~ latitat omnino, sed, si requiri iusseris, invenient hominem apud sororem tuam occultantem se capite demisso.*’

<sup>24</sup> This is indicated by Ulpian’s *praetor ait* and Cicero’s *recita edictum* (*Quinct.* 60). See Lenel 1927: 405 (= 38.205). The fact that Probus included FCL (= *fraudationis causa latitat*) in a list of legal abbreviations indicates that the phrase was ubiquitous (*Not. iur.* 6.66.1). However, it appears hardly attested outside juristic texts except in Cicero’s *Pro Quinctio*.

<sup>25</sup> Even if we do not accept that the passage may call to mind the *Pro Quinctio*, it still suggests that jurists may profit from reading Cicero. A favourite rhetorical strategy among jurists is to take someone’s legal definition in order to sharpen one’s own. As Gai. *Inst.* 3.183 shows, this does not necessarily imply a generally negative attitude towards the criticised author in question, as Nörr proposed for Ulpian in relation to Cicero on a tenuous parallel (1978: 134–6).

after 200 AD). The Digest features the following excerpt discussing the deliberate abortion of pregnancies:

Cicero in oratione pro Cluentio habito scripsit Milesiam quandam mulierem, cum esset in Asia, quod ab heredibus secundis accepta pecunia partum sibi medicamentis ipsa abegisset, rei capitalis esse damnatam. sed et si qua visceribus suis post divortium, quod praegnas fuit, vim intulerit, ne iam inimico marito filium procrearet, ut temporali exilio coerceatur, ab optimis imperatoribus nostris rescriptum est.<sup>26</sup>

Cicero in the speech *Pro Cluentio* wrote that, when he was in Asia, some woman from Miletus had been condemned on a capital charge because she herself had driven off her own foetus by means of drugs after having taken money from the substituted heirs. But also if a woman after a divorce applies violence to her womb because she is pregnant, in order not to produce a child for her now hateful husband, it has been ordered in an imperial rescript by our very best emperors that she be punished with temporary exile.

The second half of this passage tells us that the emperors of Tryphoninus' day, probably Septimius Severus and Caracalla,<sup>27</sup> affirmed that a woman who aborted her pregnancy after a divorce would be liable to penalty. That they did so in a rescript, which is an official communication in response to a petition, suggests that Roman law did not punish the abortion, or at least that the legal situation needed clarification. This impression is substantiated by Dieter Nörr's discussion of the passage, which argues that, while Roman attitudes towards abortion were generally hostile, it only became punishable in the Severan Age.<sup>28</sup> The near-quotation from the *Pro Cluentio* in the first sentence seems to point in a similar direction: not only did Tryphoninus apparently find no juristic authorities who had formulated a view in line with the rescript before, he referred to a peregrine (not Roman) case found in a by-then centuries-old courtroom speech. That is to say, the reference to Cicero must have served to create some sort of precedent or parallel for the opinion expressed in the rescript, and we should note that Tryphoninus apparently considered Cicero sufficiently authoritative as to make the rescript more palatable to a wider juristic audience.<sup>29</sup>

All in all, then, we have seen that Cicero's writings were read by jurists and were referenced in the juristic tradition, even though his occurrence is

<sup>26</sup> D. 48.19.39 pr.

<sup>27</sup> See the jurist Marcian at D. 47.11.4.

<sup>28</sup> Nörr 1978: 122–5, with Ulpian (D. 48.8.8) and Marcian (D. 47.11.4).

<sup>29</sup> See also Nörr 1978: 124–6, who entertains the idea that Tryphoninus may have circulated his rendering of the *Pro Cluentio* already before the rescript was issued and may as such have influenced policy change. This must remain speculative. I also see no reason to suppose that the second sentence in the block quote above is a later addition.

relatively marginal.<sup>30</sup> Furthermore, it should be noted that whenever Cicero is cited, he is cited for a detailed piece of legal doctrine, which is used by later jurists to support or sharpen their own views. Crucially, then, while the jurists quote Cicero only sparsely, they do quote him as if he is a jurist. Nörr emphasised that these quotations do not support the claim that the jurists considered Cicero a professional colleague, but this is once more to perpetuate Cicero's own rhetorical and somewhat disingenuous dichotomy.<sup>31</sup> Rather, the passages discussed suggest that Cicero's work was not off-limits in principle, and that the boundaries between Cicero and the jurists were more porous than Cicero claimed in his own works.<sup>32</sup>

### 3. ADVOCATES, JURISTS AND THE MYTH OF CICERO

A juristic text that brings up Cicero several times is the history of Roman jurisprudence written by Pomponius during the reign of Hadrian (D. 1.2.2). Rather than presenting a compilation of views on legal doctrine, the text constitutes a historiographical narrative of legal scholarship from the Regal period onwards. Recent studies have demonstrated extensively that Roman historiographical writings tend to push their rhetorical agendas onto their readership.<sup>33</sup> In line with these observations, this section analyses the agenda of Pomponius' account in its engagement with Cicero.<sup>34</sup> We will see that Pomponius is primarily interested in the figure of Cicero and in constructing him as of marginal importance to the field of jurisprudence. We will also see that Pomponius does so in reaction to polemical attacks by advocates, who take up hostile passages from Cicero's œuvre so as to assert their superiority over jurists.

Regarding the question why the claims of these orators are so important to Pomponius, it should be kept in mind that by his time rhetorical training had been a staple of elite culture for many generations. Authors such as Seneca the Elder, Quintilian and Suetonius give the impression that a tremendous number of people had been through the rhetorical schools that started to

<sup>30</sup> Ulpian's discussion of the term *deicere* at D. 43.16.3.8 may be a further case. Although it does not mention Cicero by name, the definition squares with Cicero's definition at *Pro Caecina* 66. Tellegen-Couperus 1991: 46 has argued plausibly that the standard juristic interpretation originates with Cicero.

<sup>31</sup> Nörr 1978: 145–7.

<sup>32</sup> Papinian at D. 48.4.8 cites Iulia's (= Fulvia's) testimony against the Catilinarian Conspirators in support of the claim that women can be heard in cases of *maiestas*. While Papinian mentions that Cicero was consul that year, this is hardly a case of Ciceronian reception as Cicero never mentions Fulvia by name – in contrast to Sallust and Florus. See on this extensively Nörr 1978: 115–21.

<sup>33</sup> See Kraus and Woodman 1997: 1–10 for a discussion.

<sup>34</sup> On the agenda of Pomponius' work more generally, see Nörr 1976 for an extensive discussion.



arise since the Augustan Age. It seems fairly clear that this type of education provided an entry ticket to a political and literary career, as well as to a career in forensic oratory.<sup>35</sup> It is therefore plausible to assume that men who made their name as jurists – men such as Pomponius – had spent time in the rhetorical schools as well,<sup>36</sup> and hence that they were familiar not only with the schools' literary curricula but also with how the discourse of advocacy constructed legal history and Cicero's role therein.<sup>37</sup> In order to contextualise Pomponius' engagement with Cicero fully, then, it is necessary to place it against the predominant narrative that we find in the rhetorical tradition.

A quick glance suffices to note that Cicero is a towering figure in the rhetorical tradition of the early Empire. From Seneca the Elder's work on the rise and development of declamatory culture at Rome, we learn that Cicero's works, especially his orations, were studied intensively, something we also gather from the work of Quintilian and from Tacitus' *Dialogus*. While Seneca's preface rhetorically claims that declamatory culture is a mere footnote to the heights of eloquence reached in Cicero's works, it is perhaps more telling about the esteem in which Cicero was held that, by the time of Seneca, the figure of Cicero had grown into a larger-than-life icon of Roman political oratory. Robert Kaster has pointed out how exceptional it is that Cicero features in the exercise scenarios of *Suasoria* 6 and 7.<sup>38</sup> The seventh exercise, for example, asks students to produce a speech advising Cicero whether or not to burn all his writings in the hypothetical situation that Antony offers mercy on this condition. Many of the speeches excerpted by Seneca advise against taking the offer on some variant of the argument that Cicero's eloquence transcends the mortal condition.

When it comes to Cicero's importance more specifically in forensic oratory, it is Quintilian who is most explicit about Cicero's all-eclipsing accomplishments. As part of his discussion that the perfect orator must be thoroughly educated across the disciplines, Quintilian argues that Cicero was the one by far closest to reaching this ideal (12.1.15–21). We should note that in developing these points Quintilian references Antonius' speech on the ideal orator in Cicero's *De Oratore* and that he himself defends a similar theory (*De or.* 1.94, 3.189). While the perfect orator of the Ciceronian text remains nameless, Quintilian's reception of it is premised on a reading that equates the figure of Cicero with the ideal of *De Oratore*. The same reading underlies Quintilian's discussion of the relation between rhetoric and juris-

<sup>35</sup> Seneca's description of Ovid's days as a student is famous (2.2.8–12). In general, see Bonner 1969, 45 for (still) the best account of this.

<sup>36</sup> Crook 1955 shows that many jurists made a career and achieved top positions under the emperors.

<sup>37</sup> This is arguably far less the case for the legal–juristic tradition, since specialist juristic education was pursued by only a fraction of the elite young men who went through the rhetorical schools.

<sup>38</sup> Kaster 1998.

prudence somewhat later on. When Quintilian argues extensively at 12.3 that the perfect orator should have extensive knowledge of the law, we find the following:

verum et M. Cato cum in dicendo praestantissimus, tum iuris idem fuit peritissimus, et Scaevolae Servioque Sulpicio concessa est etiam facundiae virtus, et M. Tullius non modo inter agendum numquam est destitutus scientia iuris, sed etiam componere aliqua de eo coeperat, ut appareat posse oratorem non discendo tantum iuri vacare sed etiam docendo. (12.3.9–10)

But indeed Marcus Cato was both the most outstanding in speaking and, likewise, the greatest expert in law; and excellence in speaking has also been granted to Scaevola and Servius Sulpicius, and Marcus Tullius was not only never devoid of knowledge of the law when pleading, but he even began to write something about that, so that it appears that an orator might devote himself not merely to learning the law but also to teaching it.

This passage uses several rhetorical ploys to project Cicero as the pinnacle of legal oratory. First, by placing Cicero at the end of this brief history and by elaborating so much on his qualities, the narrative suggests that Cicero is the culmination of legal history, both of forensic oratory and of legal scholarship. Cicero's capabilities come out even more strongly once we take into account the ancient commonplace that complete intellectual mastery comes with the ability to teach the subject in question.<sup>39</sup> He thus seems to surpass even Cato; for while Cato is praised to a superlative degree, standing out among his peers until at least the generations of Mucius Scaevola and Servius Sulpicius, nothing is said as to whether he ever taught law. Furthermore, we should note that the passage once again evokes the debate on the ideal orator in *De Oratore* by reformulating the speech of Crassus in which he urges passionately that the orator be thoroughly versed in the law (1.166–204).<sup>40</sup> Here we see once more that Quintilian engages closely with Cicero's ideas about the perfect orator, while pushing forth the idea that the figure of Cicero embodies the ideal.<sup>41</sup>

If the text in the block quotation above already suggests that jurisprudence is somehow subordinated to oratory, Quintilian makes this point crystal-clear in the immediately following paragraphs. This time Quintilian takes up a rather polemical passage from *De Oratore* to stress how difficult a task becoming a perfect orator is: many students will not achieve it. We hear that failed students regularly decide to become jurists, designated here by the pejorative term *leguleius* ('pettifogger', 12.3.11 ~ Cic. *De or.* 1.236).

<sup>39</sup> See for example Quint. 1 pr.23.

<sup>40</sup> For specific references, see Russell's notes *ad loc.* in the Loeb edition (Russell 2001).

<sup>41</sup> This is admittedly a reading encouraged by the Ciceronian *corpus* itself. The second half of the *Brutus* comes probably closest to saying this flat out.

The problem with these jurists is that they are intellectually less competent or simply lazy individuals (*desidia*, *pigritia*), who despite all this have the nerve to assert the greater usefulness of their type of law (*utiliora*). In all, then, Quintilian not only presents Cicero as the perfect orator according to Quintilian's own – Ciceronian – theory, but his reception of the Ciceronian *corpus* also involves turning Cicero into the icon of advocacy's abusive claim of superiority over jurisprudence.

The letters of Pliny the Younger suggest that the polemical attacks on jurists as found in Cicero's works enjoyed a fairly wide reception among high-profile orators. Three letters, linked by the occurrence of the term *voluntas defuncti*, discuss wills that have been formulated in such a way that the testators' wishes cannot legally be carried out (2.16, 4.10, 5.7). Since the wish of the deceased is perfectly clear in each case, Pliny claims, the solution to the legal tangle should be straightforward. But he also expresses his concern that his view will be rejected by the *iuris consulti* (5.7.2; cf. 4.10.2). By claiming that the jurists are too harsh and suggesting that they are somewhat inferior to himself (for example *convenit inter omnes* [sc. *iuris peritos*] . . . *sed mihi manifestus error videtur*, 4.10.2), his letters invoke a rivalry between orators and jurists similar to the one we saw in the case of Quintilian. Yet since Pliny needs to be careful not to enrage those he needs to persuade, his strategy is to push gently for a seemingly self-evident point, namely that the intention of the deceased take precedence over the debates of lawyers. For the same reason, his engagement with Cicero is rather surreptitious. On the one hand, Pliny's claim that the deceased's wish is *antiquior iure* (5.7.2) may be referring, as Whitton has suggested, to views to this effect associated with Cicero, as found in for example *De Legibus* 1.42.<sup>42</sup> On the other hand, the dilemmas in the three letters seem to evoke the *causa Curiana*, a Republican case that pitted the jurist Scaevola and his literal interpretation of a will against the orator Crassus, who successfully emphasised that the intention of the testator was all that mattered.<sup>43</sup> The case was made famous by Cicero's repeated discussions, which show enduring interest in Crassus' vitriolic disparaging of the jurists.<sup>44</sup> As Quintilian informs us that the case became the exemplar of disputes revolving around letter and intention (7.6.9),<sup>45</sup> Pliny, in constructing his Ciceronian *persona*, evokes a subtext that extols the advocate at the

<sup>42</sup> See Whitton 2013 *ad* Plin. *Ep.* 2.16.

<sup>43</sup> Pliny's text does not seem to make any intertextual connections, probably because he needs to be careful not to give too much offence. There is perhaps one exception: '*quid sit iuris ~ quod Scaevola defendebat non esse iuris*' (*Caecin.* 69).

<sup>44</sup> See for example Cic. *Caecin.* 69; *De or.* 1.180, 2.140–2; *Brut.* 194–8.

<sup>45</sup> La Bua 2006 may be pushing the point too far when he claims that the *causa Curiana* markedly shaped the *controversia* scenarios revolving around the opposition of letter vs spirit of the law. Rather, the *status* was already developed by the rhetor Hermagoras, whose work was used widely by Republican orators (e.g. Bonner 1969: 46–7; Winterbottom 1974: xvii). See below.

expense of the jurist. Thus, even though Pliny is less openly hostile than Quintilian, both authors engage the same polemical trope.<sup>46</sup>

Since rhetorical education was widespread in the early Empire, the discourse about Cicero and the law in the rhetorical tradition provides the intellectual context of Pomponius and his readers.<sup>47</sup> As mentioned above, the long fragment of Pomponius at D. 1.2.2 presents a history of jurisprudence from the Regal period until the reign of the emperor Hadrian.<sup>48</sup> The narrative informs us about generations of jurists with brief notes on their accomplishments, thus resembling other histories of learning such as Cicero's *Brutus* and Suetonius' *On Grammarians and Rhetors*. Pomponius seems to stay closest to the model of the *Brutus*: in addition to engaging explicitly with the *Brutus* at several points, he takes care to list the extant works of most of the jurists featured, and he often inserts a comparative assessment (*synkrisis*) of coeval jurists that brings out the strengths of all involved.<sup>49</sup> A passage from D. 1.2.2.45 about jurists who were active into the Augustan Age illustrates what is at issue here:

ex his Trebatius peritior Cascellio, Cascellius Trebatio eloquentior fuisse dicitur, Ofilius utroque doctior. Cascellii scripta non exstant nisi unus liber bene dictorum, Trebatii complures, sed minus frequentantur.

of these Trebatius is said to have been more expert (in the law) than Cascellius, Cascellius more eloquent than Trebatius, Ofilius more learned than either one. Cascellius' writings are not extant except for one book of well-formulated legal maxims, of Trebatius quite some [are extant], but they are less frequently resorted to.

While the passage has raised ample debate about the personal histories of these jurists, for present purposes I will focus on the rhetoric of the *synkrisis*. We should note that the criteria on which Pomponius compares Trebatius and Cascellius, legal scholarship and eloquence, are founded on the same

<sup>46</sup> This is not to say that Pliny was hostile to jurists in general, nor that a polemical approach is the only approach found in the rhetorical tradition of the early Empire (cf. e.g. Sen. *Controv.*; Tac. *Dial.* 39).

<sup>47</sup> This is one of my main disagreements with Nörr 1978: he simply assumes that Pomponius is responding to Cicero's attacks on the jurists, whereas I believe that the intervening rhetorical tradition is of great significance.

<sup>48</sup> The following textual note is in order: the Digest credits the passage to a one-book version of Pomponius' *Enchiridion*, whereas at other places it quotes from a two-book version, of which the one-book version may be an abridgement. In any case, I will be assuming that the text can be read as a product of Pomponius' days, and can be meaningfully contextualised in the intellectual culture of the late first and early second centuries.

<sup>49</sup> It is difficult, if not impossible, to decide whether Pomponius' direct model is indeed Cicero's *Brutus*, or whether he works from a tradition of texts of which the *Brutus* is one exponent. References in Quintilian, Tacitus, Gellius and Fronto suggest that Pomponius in all likelihood knew the *Brutus* (see Nörr 1978: 139).



distinction between orators and jurists that we have witnessed in Cicero and the rhetorical tradition of the early Empire. The quotation above is part of a larger passage that activates this rivalry and also stages the figure of Cicero, whom, as we saw, the rhetorical tradition constructed as the alpha male (D. 1.2.2.40–6). In doing so, Pomponius invokes the same *topos* to demonstrate the value of jurists while denying Cicero any importance to legal learning. How does Pomponius do this?

In the first place, while his name is mentioned three times, Cicero is never acknowledged as having contributed anything to the area of law. When Pomponius discusses Quintus Mucius Scaevola the Pontifex, we hear about his seminal contribution to the organisation of the *ius civile* as well as about the many students he educated. Yet while Cicero in his own works emphasises time and again that he studied under Mucius, Pomponius does not even list Cicero among Mucius' pupils. Nor does Cicero's friendship with Servius Sulpicius Rufus receive any attention, even though Cicero himself dwells extensively on it, especially in the *Brutus*. Instead, Pomponius cites Cicero simply as a source of some specific pieces of information in his narrative. At one point, he praises Cicero as an orator by claiming that the *Pro Ligario* is a 'most beautiful speech' (*oratio satis pulcherrima*, 1.2.2.46). But even in this last case, Cicero's presence is marginalised, because Pomponius' elaboration on the case is in all likelihood drawn from the speech of Cicero's adversary Tubero, not from Cicero's own speech.<sup>50</sup> Pomponius thus suppresses the voice of Cicero, the forensic orator, even when bringing up oratory.

Furthermore, Pomponius also resists Cicero's attacks by citing several polemical passages from the *Brutus* while rewriting their narrative to let the jurists emerge as intellectual powerhouses. This strategy can be seen at work at least three times in the passage under discussion here. The first case occurs in Pomponius' mentioning of Lucius Crassus, 'the brother of Publius Mucius, who is called Mucianus: Cicero says that he is the most well-spoken of the jurists' (*frater Publii Mucii, qui Mucianus dictus est: hunc Cicero ait iurisconsultorum disertissimus*, 1.2.2.40).<sup>51</sup> This specific Crassus must be the consul of 131 BC, who was the brother of Publius Mucius Scaevola (father of Quintus) and the father of Licinius Crassus (cos. 92). Several verbal echoes suggest that the praise Pomponius puts in Cicero's mouth is adapted from *Brutus* 145, a discussion of the *causa Curiana* in which the younger Crassus and Quintus Mucius Scaevola served as lawyers. In styling Crassus

<sup>50</sup> That is, several facts in Pomponius do not match the account in the *Pro Ligario*. Nörr thinks that Pomponius misremembered the speech, assuming that Cicero's speech was transmitted orally (1978: 137). Yet it is much more plausible to assume that Pomponius is summarising Tubero's (now-lost) speech, which was known to Quintilian. The drama of the story can easily be seen as in line with Tubero's side, rather than that of Ligarius. Pomponius is thus taking the side of Tubero, the jurist in the story.

<sup>51</sup> The transmitted text is *Mucianus*; I follow Mommsen in taking this as a corruption.

as the prototypical orator and Quintus Mucius as the prototypical jurist, Cicero extols Crassus as 'the most learned in law of those who are eloquent' (*eloquentium iuris peritissimus*), while Quintus Mucius is called 'the most eloquent of those who are learned in law' (*iuris peritorum eloquentissimus*, Cic. *Brut.* 145; cf. *De or.* 1.180). As we have already seen, Cicero is primarily interested in setting up this distinction because it serves his larger agenda to claim that orators are the superior class of lawyers. Pomponius, on the other hand, takes up the praise for Quintus Mucius Scaevola and projects it back onto the uncle, thus conflating the famous jurist and the father of the famous orator. By foregrounding juristic accomplishments and emphasising family connections, Pomponius underlines that the Crassi are part of a larger juristic clan – perhaps implying that the younger Crassus' success as an orator was made possible by the family's legal expertise.

The biographical section on Servius Sulpicius is the second point at which Pomponius recasts a hostile passage from Cicero's *Brutus*. At *Brutus* 150–7, Cicero argues extensively (1) that his friend Servius Sulpicius Rufus is a superior jurist compared to Quintus Mucius Scaevola, and (2) that Cicero himself outranks Servius by virtue of being an orator rather than a jurist. In making his point, Cicero works with his favoured contrast between orators and jurists. We hear that, in the course of studying rhetoric together, Servius decided to turn to jurisprudence in order to be 'first in the second art' (*in secunda arte primus*, 151), rather than having to stand in Cicero's shadow and be 'second in the first art' (*in prima secundus*). Note that Cicero insists that Servius consciously chose to turn to jurisprudence. Furthermore, Cicero argues passionately that Servius' scholarship is in a different league from Quintus Mucius' because Servius was the first to bring 'dialectic' to jurisprudence (153).<sup>52</sup> On the other hand, it is immediately obvious that Pomponius' narrative about Servius is rather different. While Pomponius stays close to the *Brutus* when he reports that Servius was the best orator 'certainly after Cicero' (*pro certo post Marcum Tullium*, 1.2.2.43), we then read a rather dramatic story about Servius' conversion to jurisprudence in which Quintus Mucius Scaevola plays a key part. Servius allegedly consulted Mucius on a point of law, only to realise later that he had misunderstood Mucius' words. The same thing happened a second time. On Servius' third visit Mucius reprimanded him by saying that it was a shame (*turpe*) for a patrician to be ignorant about the law (*ius*) on which the case he was pleading depended. The story ends by saying that Servius, driven by the 'harsh words' (*velut contumelia*), decided to devote himself to law. Several differences with Cicero's account stand out. First, Quintus Mucius is portrayed as the godfather of Roman law that most sources make him to be. At the same time, nothing is

<sup>52</sup> Cicero is probably inflating Servius' importance – and the explicit surprise of the *Brutus*' interlocutors suggests that the claim was expected to be controversial. The juristic tradition passes over this claim in complete silence (see below).

said about Servius' qualities as a jurist. Second, while Pomponius mentions that Cicero is the best orator, there is no trace of any suggestion that this makes him superior. Rather, it seems that jurisprudence is a separate and challenging world of learning, to which only exceptional individuals turn.

The image that jurisprudence is particularly demanding is further substantiated by a parallel conversion story in Pomponius' treatment of Tubero. We have already seen that Tubero found himself in court against Cicero, who acted as Ligarius' advocate. Before telling us about the trial, however, Pomponius reports that Tubero was 'a patrician and went over from pleading cases to jurisprudence' (*patricius et transit a causis agendis ad ius civile*, 1.2.2.46), after the trial against Ligarius. The motif of the conversion thus provides an intriguing alternative view on the rivalry between orators and lawyers. In contrast to what we see in Cicero and Quintilian, Pomponius' narrative gives the impression that select individuals turned to jurisprudence after they had started careers as orators; in Servius' case this even took the colossal efforts of an exceptional, erudite mentor. Only the most capable men specialised further in jurisprudence. Note in this connection that nothing negative is said of Servius and Tubero: Servius was one of the best pleaders, and while we hear that Tubero lost his case against Cicero, Pomponius does not disqualify his oratory in any way. We also read that both were extremely successful as jurists: Servius had a tremendous following, and Tubero is called 'most learned' (*doctissimus*). This last statement illustrates once more how Pomponius turns Cicero's hostile narrative in the *Brutus* into a version that is favourable to the jurists. Taking up *Brutus* 117, Pomponius reformulates Cicero's claim that Tubero was 'most learned in detailed argumentation' (*doctissimus in disputando*) into the more scholarly attribute of being 'learned in public and private law' (*doctissimus . . . iuris publici et privati*). Furthermore, while Cicero claims that Tubero's style was 'harsh, rough, uncouth' (*durus horridus incultus*), Pomponius tells us that Tubero wrote 'in an archaic style' (*sermone . . . antiquo*) with the result that his works are not read very often. In Pomponius' hands, the disparaging Ciceronian narratives about jurists are rewritten as more balanced, if not positive, stories.

To sum up, if we juxtapose how the rhetorical tradition of the early Empire and Pomponius' account deal with Cicero in relation to the law, Cicero and his writings emerge as the centrepiece of a fierce polemical debate. On the one hand, the reception of Cicero's theories on the ideal orator by authors such as Quintilian entails casting the figure of Cicero in that role. For Quintilian, a crucial ploy is to assert aggressively the superiority of Cicero-the-perfect-orator over the jurists. On the other hand, while invoking the same Ciceronian intertexts, Pomponius not only constructs Cicero as a mostly irrelevant figure, but he also presents jurisprudence as an exacting and therefore exclusive field of study. In pushing their points, orators and jurists both work with a clearly marked dichotomy between legal oratory and legal scholarship, indicating their reception of Cicero's

rhetorical strategy. That orators and jurists felt the need to engage in such polemics, however, suggests that they were talking to each other to some extent, and that the boundaries between the two fields may have been fuzzier than their rhetoric claims them to be.<sup>53</sup> We should take into account here that Cicero was not only the source of the polemical tropes but that he apparently also contributed enough to juristic debates – something we saw in the preceding section – as to be considered a borderline case. While this facilitated his portrayal as an interdisciplinary genius in the hands of the orators, it might also help to explain why, for Pomponius, Cicero warranted explicit exclusion.

#### 4. LEGAL PHILOSOPHERS OF ROME: THE CASES OF CICERO AND LABEO

The question as to Cicero's importance as a philosopher to Roman legal thought is a problematic and highly contested one. The preceding sections of this chapter surveyed all explicit references to Cicero and his writings in the Digest, revealing that Cicero is never mentioned by jurists in relation to any philosophical conceptual elaborations. If this encourages us to study Cicero's reception at the level of ideas, it is crucial that, before turning to the sources, we first address a set of conceptual and methodological questions that have surprisingly often been ignored: what do we mean when we talk about importance, influence, or reception? And how do we establish whether possible connections between texts and ideas found in the output of jurists and in Cicero are meaningful?

As already indicated above, the scholarship so far has usually taken an approach informed by *Quellenforschung*. For example, Dieter Nörr's important work on quotations from Cicero in the jurists studies the manifest and latent influence of Cicero – the latter signifying ideas about which jurists were unaware that they have an origin in Cicero's works.<sup>54</sup> While the search for latent influence may sometimes yield returns,<sup>55</sup> the problem is that such connections are generally hard to trace and to establish beyond reasonable doubt. Illustrative here is the often-held assumption that technical terms found both in the philosophical and in the juristic traditions reached the jurists via Cicero, frequently with the further assumption that the jurists in question must have subscribed to Ciceronian conceptions of the terms, though

<sup>53</sup> To the same effect, though from a different perspective, Mantovani 2007 and Bettinazzi 2014 argue that the declamations ascribed to Quintilian at many points reveal in-depth knowledge of technical juristic argumentations.

<sup>54</sup> Nörr 1978 (e.g. 'über latente Einflüsse zu spekulieren', at 142).

<sup>55</sup> For example Tellegen-Couperus 1991 on Cic. *Caecin.* (see above); the case is not mentioned by Nörr.

without crediting him.<sup>56</sup> Prime examples are the notions of natural law and of *aequitas*. Yet several considerations show how problematic this view is.

First and foremost, the concepts are hardly conceptualised explicitly by jurists outside the few excerpts in Digest 1.1, which still seem fairly generic: while the famous passages of Gaius and Ulpian distinguish different types of universal law and hence seem to clash, many scholars have pointed out that it is well nigh impossible to discern philosophical differences between these authors' jurisprudence.<sup>57</sup> Even though Gaius brings up a *naturalis ratio* repeatedly, it never becomes quite clear what this *naturalis ratio* is in conceptual terms. Rather (and perhaps somewhat provocatively), the term functions rhetorically for Gaius to posit an axiom – a starting point that he does not want to elaborate further on in the context of the argument he is making. Because the notion is conceptually unarticulated, the source question also becomes problematic. While Gaius probably found it in earlier juristic works, it is on the present evidence impossible to say whether it entered the juristic tradition through Cicero's works.<sup>58</sup> The spread of the idea of natural law in the philosophical and rhetorical traditions signals that there are many ways, also beyond Cicero, in which it may have reached the jurists.<sup>59</sup>

Much the same case can be made for the concept of *aequitas*. We find the most articulate juristic elaboration in a passage of Marcus Antistius Labeo, a much-admired scholar of the Augustan Age, where he distinguishes between *aequitas naturalis* and *aequitas civilis* – both still vaguely defined (D. 47.4.1.1). Once more, the Ciceronian connection cannot be pressed, because the opposition between written law and equity had already been a commonplace in the rhetorical tradition long before Cicero.<sup>60</sup> Thus the so-called *stasis* theory of the second-century BC rhetorician Hermagoras standardised an argumentative pattern that opposed the letter of the law and more universal considerations of justice.<sup>61</sup> It is essential to note that, rather than embodying a substantive and philosophically developed idea, *aequitas* functions here as a concept that can be fleshed out according to the immediate needs of the forensic orator in the case he is arguing. In short, then, the Ciceronian signature of many of the jurists' theoretical notions cannot be taken for granted,<sup>62</sup> at least not without further evidence.

<sup>56</sup> For example Ando 2008: 79–92; MacCormack 2014: 254–5.

<sup>57</sup> See Atkins 2013: 224–6 for a recent discussion with further literature.

<sup>58</sup> Idem: 224–5 suggests that Ulpian's distinction between *ius civile*, *ius gentium*, and *ius naturale* may be taken from Cicero, but that in working with these notions Ulpian is hardly a follower of Cicero.

<sup>59</sup> For example in Cic. *Inv. rhet.* 2.67 and *Rhet. Her.* 2.19, which both digest older rhetorical doctrine (cf. Arist. *Rh.* 1.13, 1373b4–9). Stoics and Epicureans (among other philosophers) discuss their conceptions of natural law.

<sup>60</sup> For example Cato the Elder (fr. 168.1 = Gell. NA 6.3.38).

<sup>61</sup> Bonner 1969: 46–7 (see above).

<sup>62</sup> Gaius' famous distinction between *res corporales* and *res incorporales* may eventually go

In contrast to a focus on source criticism, which leads us to scholarly *aporia* at best and negative conclusions at worst, a perspective based on reception studies encourages us to ask how jurists appreciate Cicero as a philosopher of law. While we have already seen that the jurists do not connect Cicero with philosophy in the Digest, this does not imply that they do not discuss the role of philosophy in law. Quite to the contrary, several observations indicate that jurists construct the aforementioned Labeo as a foundational figure who appears to displace Cicero by virtue of his expertise in law and philosophy. In the first place, a study of patterns of citation in the Digest yields that Labeo, a relatively early jurist, is cited much more frequently than jurists before him and those for several decades after his death. We should note that Labeo's views are often transmitted through quotations in Ulpian, whose work formed the basis of the Digest by supplying around 40 per cent of the excerpts.<sup>63</sup> Ulpian's interest in Labeo indicates that he must have found Labeo important to the development of legal doctrine.

In line with his profile in the Digest, several texts indicate that the significance of Labeo goes hand in hand with his reputation as a polymath in the early Empire. Thus Pomponius reports that 'Labeo, who had also put work in other fields of learning, set out to make very many innovations on account of the quality of his genius and the faith in his own learning' (*Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis sapientiae operam dederat, plurima innovare instituit*, 1.2.2.47). While Pomponius does not single out philosophy as one of Labeo's occupations, his designation of Labeo's learning with the term *sapientia* carries strong philosophical connotations. The picture of Labeo as having philosophical credentials is further substantiated in the work of Aulus Gellius, an author of the second century AD. Gellius' testimony is of particular importance, because, while not a jurist himself, he was a close and interested observer of jurists. His *Noctes Atticae* thus provide a window onto second-century juristic culture independently of the juristic tradition, including its excerptors. While Gellius expresses his admiration for Labeo at many points, his most extravagant eulogy can be found in Book 13:

Labeo Antistius iuris quidem civilis disciplinam principali studio exercuit et consulentibus de iure publice responsitavit; <set> ceterarum quoque bonarum artium non expers fuit et in grammaticam sese atque dialecticam litterasque antiquiores altioresque penetraverat Latinarumque vocum origines rationesque percalluerat eaque praecipue scientia ad enodandos plerosque iuris laqueos utebatur.<sup>64</sup>

back to Cicero's *Topica* 26–7, but the point of both passages is conceptually distinct (see Reinhardt 2003, 259, 263). Yet even if we consider this a case of Ciceronian influence, it remains an open question whether the substance or merely the expository scheme of Roman law have been 'influenced'.

<sup>63</sup> Honoré 2010: 5–6.

<sup>64</sup> Gell. NA 13.10.1.

Labeo Antistius devoted himself with the foremost zeal to the study of the *ius civile* and he formulated opinions 'publicly'<sup>65</sup> about the law to those who consulted him; but he was also not destitute of the other good arts and he had immersed himself in the study of grammar and in dialectic and the lofty literature of the olden days and he was steeped in the origins and explanation of Latin words, and he used that knowledge in particular to untie many knots in the law.

The passage underscores Labeo's importance to the *ius civile*. What makes him so erudite and productive is that he was educated across the intellectual board. Even though we hear that antiquarian studies and grammar were the greatest assets to the legal scholar, his mastery of philosophy in the form of dialectic is also highlighted. All this reinforces the account of Pomponius. Yet we should also note that we hear nothing about what we would call legal philosophy: Labeo's valued accomplishments lie in bringing logic to the field of law.<sup>66</sup>

Finally, while so far I have discussed Labeo as someone who is presented as the prime philosopher in the legal sphere, there is some evidence to suggest that, being aware of Cicero's foundational status in legal oratory, some jurists consciously constructed Labeo as the Cicero of Roman jurisprudence. An excerpt of the jurist Paul (early third century AD) brings up a hypothetical case with a fictional subject (D. 34.3.28.4). This subject is called Antistius Cicero. Paul's choice to combine the names of Labeo and Cicero signals that he considered the two historical characters to some extent on a par. It is tempting to take this as a nod at Labeo's and Cicero's status as intellectual patriarchs in jurisprudence and forensic oratory respectively.

## 5. CONCLUSION

Cicero's reception among the jurists is a complex phenomenon. When it comes to Cicero's writings, especially his speeches, jurists occasionally quote Cicero as a jurist. Above we have encountered several definitions and analogies from Cicero's hand that are credited explicitly to him. In this connection, the watertight separation between orators and jurists that Cicero himself posited collapses to some extent. On the other hand, when it comes to the figure of Cicero and his place in legal history, he turns out to be a controversial character: while Pomponius mentions Cicero but marginalises him, Cicero's role as a philosopher is passed over in complete silence. In his place, Labeo receives full credit. Thus, paradoxically enough, the quotations and the controversy around his person together cement Cicero's place in

<sup>65</sup> The meaning of *publice* in this passage is highly contested. To be sure, its possible connection with Pomponius' *publice respondendi ius* (1.2.2.49) is irrelevant to my argument here.

<sup>66</sup> Note that the jurists ignore completely Cicero's similar praise of Servius Sulpicius Rufus at *Brut.* 153 (see above).

Roman law. In the eyes of the jurists discussed above, Cicero was undeniably important to Roman law. This is most evident at points where Cicero is not mentioned but lurks under the surface.

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## Chapter 8

### *Servius, Cicero and the Res Publica of Justinian*

Jill Harries

#### 1. INTRODUCTION

In 45 BC, Servius Sulpicius Rufus and Cicero exchanged letters containing reflections on the recent death of Cicero's daughter Tullia. This tragic event was assimilated by both to what they saw as the 'death' of the *res publica*, defined loosely by both as the constitutional order that had underpinned their own success and prestige, and that now, thanks to the victory of Caesar, was no more. However, both also resorted to survival strategies: a continued involvement, somehow, in the affairs of the *res publica*; and the fulfilment of obligations to the interests of clients and friends.<sup>1</sup>

Although the emotions that prompted the exchange were heart-felt (at least on Cicero's side), the pair of letters was also a jointly created literary artefact. Both writers were masters of rhetoric (despite Cicero's allegations to the contrary with regard to Servius in the *Pro Murena*) and their arguments add up to a joint exercise in self-representation as the chief mourners for a defunct *res publica*. As an analysis of what was meant by *res publica*, the letters leave much to be desired in that they may reflect Servius' more limited political and philosophical outlook; Cicero, even when profoundly afflicted by grief, could do better, as is evidenced in the *Tusculan Disputations*, also a response to Tullia's death.<sup>2</sup> In other words, Cicero, as so often, adapted himself to his correspondent.

Cicero's and Servius' concern with helping friends would provide a means to enable the elite under the Empire to survive and prosper as manipulators of networks of power. Among them, Servius' intellectual successors, the Roman jurists, also prospered; his career, and the subsequent perspectives on it, illustrated here through brief analyses of the presence of Servius in Celsus and Pomponius, illustrate how easily the *iuris periti* could adapt to a new constitutional order, by representing it as a continuation of the old. The 'procuratorial' attitude to the role of the *populus* in the *res publica* in

<sup>1</sup> For Cicero's overall definition of *res publica*, see Schofield 1995.

<sup>2</sup> *Tusc.* 4.1.1 for laws as directors of *res publica*; for death of Tullia; *Att.* 12.28.2; full discussion and other references at Hammer 2014: 79–87. On the *Tusculan Disputations* as a response to Caesar's victory, with an emphasis on history and education, see Gildenhard 2007.

# Cicero's Law

*Rethinking Roman Law of the Late Republic*

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